IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DAVID HAWKINS Plaintiff, v. **SCHWAN'S HOME SERVICE, INC.** Defendant.	Civil Case No. 5:12-cv-00084-HE

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND SUPPORTING MEMORANDUM

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DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SUPPORTING MEMORANDUM

COMES NOW Defendant Schwan's Home Service, Inc. ("Schwan's"), by and through its counsel of record, and for its Memorandum of Law in Support of Motion for Summary Judgment, states as follows:

I. INTRODUCTION

David Hawkins brings disability discrimination, retaliation, and failure to accommodate claims under the Americans with Disabilities Act ("ADA") and the Oklahoma Anti-Discrimination Act ("OADA") against his former employer, Schwan's. He appears to bring his OADA claim as a common-law *Burk* tort, but he cannot, for reasons discussed below.

Mr. Hawkins was a Facility Supervisor for Schwan's at its sales and distribution depot in Alva, Oklahoma. He reported to Jim Hillaker, Location General Manager, who oversaw the depot's entire operations. Mr. Hillaker focused on managing the sales side of the depot and the Route Sales Representatives ("RSRs").

Schwan's route trucks are commercial motor vehicles over 10,001 pounds. The U.S. Department of Transportation ("DOT") regulates the trucks and their operators. Mr. Hawkins' Facility Supervisor position requires DOT qualification because a Facility Supervisor must be able to operate the route trucks. A Facility Supervisor is responsible for maintaining the trucks. A Facility Supervisor must be able to take the trucks to repair shops. A Facility Supervisor must also be able to shuttle route trucks between depots. Because Schwan's route trucks are the life-blood of its business, it is an essential qualification for a Facility Supervisor to be able to drive one.

As Facility Supervisor, Mr. Hawkins' responsibilities included the following: managing and maintaining Schwan's fleet of sales and delivery route trucks regulated by the DOT; managing and maintaining inventory; maintaining the facility; and managing a small staff of Material Handlers who each evening, along with Mr. Hawkins, loaded frozen food products from the walk-in freezer into the refrigerated, DOT-regulated route trucks.

During his employment with Schwan's, Mr. Hawkins had problems with his heart. His heart problems required a pacemaker and required him to take a large number of prescription medications. Mr. Hawkins had a blood-pressure induced stroke in June 2010. The stroke caused him to go to the hospital's emergency room. Around the same time, Mr. Hawkins told a coworker that he passed out while driving his personal vehicle home from work. In addition, Mr. Hawkins told his co-workers that if they found him unconscious on the floor at work to put a glycerin tablet under his tongue. He mentioned to a Schwan's Human Resources Manager that he thought it was unsafe for him to be driving because he was having fainting spells.

Mr. Hawkins admits his medical conditions prevent him from passing a DOT medical evaluation and obtaining a valid Medical Examiner's Certificate ("MEC"). Yet obtaining a valid MEC is an essential qualification for his Facility Supervisor position. When Mr. Hawkins failed to pass a DOT medical examination on June 21, 2010, Schwan's removed him from his DOT position, placed him on leave, and provided him thirty days to either obtain a MEC or find a non-DOT job within The Schwan Food Company's subsidiaries.

Mr. Hawkins was not disabled. Schwan's did not perceive him as disabled. He could work. He just could not drive a commercial motor vehicle. Even though Mr. Hawkins was not disabled and Schwan's had no obligation to do so, Schwan's invited Mr. Hawkins to participate in the interactive accommodation process and provided him the opportunity to look for other jobs. Instead, Mr. Hawkins resigned the next day.

Mr. Hawkins admits that he drove Schwan's route trucks as part of his job. Mr. Hawkins never suggested to anyone at Schwan's that he would like to (or could) do his job without the ability to operate a Schwan's truck. The ability to operate a commercial motor vehicle is an essential qualification of the Facility Supervisor job. But Mr. Hawkins now claims that operating a Schwan's route truck was not an essential function of his Facility Supervisor position.

Mr. Hawkins' disability discrimination claim fails because he was not disabled, he was not capable of performing the essential functions of his job with or without reasonable accommodation, and he immediately resigned instead of taking advantage of the opportunities Schwan's provided him. Also, Schwan's did not retaliate against Mr. Hawkins. He did not engage in any protected activity. He did not suffer an adverse employment action. And there is no causal connection between any potential alleged protected activities or adverse employment actions. Schwan's respectfully requests the Court grant summary judgment in its favor.

II. STATEMENT OF UNCONTROVERTED FACTS

A. Mr. Hawkins' background and work history.

1. Schwan's Home Service, Inc. sells and delivers frozen food products to residential customers throughout the United States; Schwan's has grown to be one of the largest branded frozen food companies in the United States. [Exhibit A, Hawkins Depo. 184:6-17, Depo. Ex. 12, Employee Handbook, at Bates No. A01736].

2. Schwan's hired David Hawkins as a Material Handler in 1987. [Exhibit A, Hawkins Depo. 166:2-17, Depo. Ex. 4].

3. In 2003, Mr. Hawkins became a Facility Supervisor with Schwan's at its Alva, Oklahoma sales and distribution depot (then called Facility Manager). [Exhibit A, Hawkins Depo. 168:22-169:18, Depo. Ex. 5].

4. Jim Hillaker was the Territory Sales Leader at the Alva, Oklahoma depot (then called Location General Manager). He supervised Mr. Hawkins in 2009 and 2010. [Exhibit A, Hawkins Depo. 53:7-10; Exhibit D, Hillaker Depo. 4:2-25].

5. Mr. Hillaker also supervised the sales side of Schwan's business at the Alva, Oklahoma depot, which included supervising the RSRs. [Exhibit G, Thompson Depo., 35:3-13].

6. The Facility Supervisor position Mr. Hawkins held is subject to DOT-qualification regulations because the position requires the operation of vehicles weighing in excess of 10,001 pounds that are engaged in interstate commerce. [Exhibit F, Thompson Affidavit, ¶ 3, Exhibit G, Thompson Depo., 12:6-8].

7. Persons who operate DOT regulated vehicles must have, among other qualifications, a valid DOT Medical Examination Certification. In part, obtaining a MEC requires passing a medical examination by meeting all physical requirements prescribed in the DOT regulations. [Exhibit F, Thompson Affidavit, ¶¶ 3, 7].

B. Mr. Hawkins' medical conditions prohibited him from maintaining DOT medical qualifications.

8. The parties stipulate that Mr. Hawkins' medical conditions would prevent him from passing the DOT medical certification. [Exhibit B, Edwards' Depo. 33:8-11].

9. On April 12, 2010, one of Mr. Hawkins' physicians, Dr. Uma Gunaganti, completed a form that said Mr. Hawkins was able to perform the essential functions of his job. [Exhibit A, Hawkins Depo. 219:4-22, Depo. Ex. 39].

10. Mr. Hawkins told a co-worker that he had fainting spells. Mr. Hawkins mentioned to his co-worker that he fainted while driving home from work one evening. [Exhibit H, Talley Depo. 18:13-22, Depo. Ex. D, Talley Declaration, Sept. 24, 2012].

11. Mr. Hawkins told Mr. Hillaker that Mr. Hawkins had instructed other employees in the depot to put a pill underneath his tongue if they found him passed out at work. [Exhibit K, Hillaker Declaration, ¶ 10].

12. Mr. Hawkins applied for Social Security Disability Insurance in June 2010. [Exhibit A, Hawkins Depo. 140:22-141:18].

13. On June 14, 2010, Mr. Hawkins sent an e-mail to Jeff Booth, Schwan's Human Resources Manager. Mr. Hawkins said one concern he had was that Mr. Hillaker wanted him to drive the Schwan's route truck to Enid. Mr. Hawkins said another concern he had was that Mr. Hillaker made him drive Schwan's route trucks back and forth to Woodward. Mr. Hawkins was concerned that he could not safely drive the Schwan's trucks. [Exhibit M, Hawkins 6/14/2010 E-mail].

14. On June 21, 2010, Mr. Hawkins visited Dr. Bill Edwards, D.O., a physician in Oklahoma City, Oklahoma, for a DOT medical evaluation. Dr. Edwards did not grant Mr. Hawkins a MEC because of Mr. Hawkins' health history. Specifically, Dr. Edwards was concerned that Mr. Hawkins had gone to the emergency room with a blood-pressure induced mini-stroke the weekend before. [Exhibit B, Edwards Depo. 28:24-29:22, 33:8-21, Depo. Ex. 1, at A06826].

15. On June 22, 2010, Schwan's delivered a letter to Mr. Hawkins placing him "on a 30 day company requested unpaid leave, effective June 21, 2010, because [he] did not pass [his] DOT recertification." The letter said that "DOT Certification is a requirement" of the Facility Supervisor position because the position is "subject to U.S. Department of Transportation regulations." The letter provided Mr. Hawkins with thirty

days to find a non-DOT position or obtain the DOT certification card. The letter told Mr. Hawkins to "[p]lease continue to keep in contact with Jim Hillaker, Location General Manager, regarding your leave." [Exhibit A, Hawkins Depo. 232:2-21, Depo. Ex. 47].

C. Schwan's aided Mr. Hawkins by giving him thirty days to either obtain a MEC or find a non-DOT position – Mr. Hawkins abruptly resigned.

16. Around June 22, 2010, Mr. Hawkins spoke on the phone with Sara Brinks, former Leave of Absence Administrator. [Exhibit A, Hawkins Depo. 85:12-90:12].

17. In their conversation, Ms. Brinks told Mr. Hawkins that Schwan's was placing him on a thirty day company-requested leave because the doctor did not give Mr. Hawkins a MEC. [Exhibit A, Hawkins Depo. 85:12-23].

18. In their conversation, Ms. Brinks informed Mr. Hawkins that he could apply for other non-DOT positions on schwansjobs.com. She specifically told him that there were non-DOT positions with other subsidiaries of The Schwan Food Company. She advised Mr. Hawkins that Schwan's Global Supply Chain has a plant in Oklahoma and Schwan's Consumer Brands also has non-DOT positions. [Exhibit A, Hawkins Depo. 85:12-90:12; Exhibit I, Brinks Depo. 11:18-12:5, 24:25-25:10].

19. Schwan's Home Service, Inc. and other subsidiaries of The Schwan Food Company had open non-DOT positions in Oklahoma during Mr. Hawkins' thirty day leave period from June 22, 2010 until July 22, 2010. [Exhibit I, Brinks Depo. 19:11-20:22, Depo. Ex. 16].

20. Mr. Hawkins says he accessed schwansjobs.com and looked at jobs but did not apply for any. [Exhibit A, Hawkins Depo. 90:16-25].

21. Mr. Hawkins voluntarily resigned from his employment with Schwan's on June 23, 2010, the day after Schwan's sent its letter placing him on leave and providing him with thirty days to either find a non-DOT position or obtain a MEC. [Exhibit A, Hawkins Depo. 233:1-13, Depo. Ex. 48].

D. Being DOT medically qualified is an essential qualification of the Facility Supervisor position.

22. Schwan's Facility Supervisors are required to be DOT medically qualified. [Exhibit D, Hillaker Depo. 9:9-13; Exhibit F, Thompson Affidavit, ¶¶ 3-8; Exhibit G, Thompson Depo. 12:6-8; Exhibit H, Talley Depo. 18:13-22, Depo. Ex. D, Talley Declaration, Sept. 24, 2012].

23. Mr. Hawkins underwent DOT medical evaluations and possessed MECs before Dr. Edwards failed him on June 21, 2010. [Exhibit A, Hawkins Depo. 216:8-14, 217:10-25, 221:2-9, Depo. Exs. 36, 38, 41].

24. Schwan's required Seth Bower, who it hired as the Alva Facility Supervisor in August 2010, to obtain DOT qualification as a condition of his employment. [Exhibit L, Alva Facility Supervisor DOT Documents, Bates Nos. A01255R, A01256R, A01266R].

25. Schwan's required Matthew Valade, who it hired as the Alva Facility Supervisor in August 2011, to obtain DOT qualification as a condition of his employment. [Exhibit L, Alva Facility Supervisor DOT Documents, Bates Nos. A01112R, A01118R, A011110R].

26. According to the Facility Supervisor I Job Description, the Facility Supervisor "[m]ust meet the Federal Department of Transportation eligibility requirements, including appropriate driver's license and corresponding medical certification as a condition of employment for this position." [Exhibit A, Hawkins Depo. 180:6-181:2, Depo. Ex. 11].

27. According to the Facility Supervisor I Job Description, one typical duty and responsibility of the job is that the employee "[m]anages designated fleet management responsibilities. . . ." [Exhibit A, Hawkins Depo. 180:6-181:2, Depo. Ex. 11].

28. According to the Facility Supervisor I Job Description, another typical duty and responsibility of the job is that the employee "[c]ollaborates with General Manager(s) – Location, to coordinate the proper inventory levels. Coordinates the receiving of product with Demand Replenishment Planning (DRP) and Dispatch. . . ." [Exhibit A, Hawkins Depo. 180:6-181:2, Depo. Ex. 11].

29. In 2005 or 2006, Mr. Hawkins drove a Schwan's truck from Wichita, Kansas to Alva, Oklahoma, after picking the truck up in Wichita following repair work. [Exhibit E, Cookson Declaration].

30. Mr. Hawkins drove back and forth from Woodward and Enid, Oklahoma to Alva, Oklahoma. [Exhibit D, Hillaker Depo. 22:24-23:8, 25:6-13].

31. The driving time from Alva to Woodward is about one hour and twenty minutes. Enid is about 70 miles from Alva. [Exhibit D, Hillaker Depo. 24:6-8, 25:8-13].

32. In 2007, Mr. Hawkins admits he drove Schwan's trucks "from Alva to Enid to load and drive the truck back from Enid to Alva, and then do the same in Woodward, then do the same in Laverne. . ." [Exhibit A, Hawkins Depo. 154:7-13].

33. In 2010, Mr. Hawkins admits he drove Schwan's trucks to get them serviced and also to shuttle fully loaded trucks to RSRs for the next sales day. [Exhibit D, Hillaker Depo. 22:2-9, 22:24-23:8].

34. Mr. Hawkins described this duty as, "let's not let the driver drive in, . . . he can stay out there, reload a truck, drive it to Woodward, drop that truck off to him and bring the truck he was in back to Alva and load it for the next time he needs another truck." [Exhibit A, Hawkins Depo. 150:17-24].

35. Mr. Hawkins says he would drive out a truck filled with product, pick up a relatively empty truck, bring that truck back to the depot and then load and deliver the truck to another route driver. [Exhibit A, Hawkins Depo. 151:1-7].

36. The reason that Mr. Hawkins had to drive in May and June 2010 is "[Schwan's] had changed route guys and half of them were staying over in Woodward, and the mechanic in Alva said he would not work on [Schwan's] stuff anymore, so [Schwan's] had to take [its] stuff to Enid." [Exhibit H, Talley Depo. 26:2-19, Depo. Ex. 1, Talley Declaration, Jan. 24, 2013, p. 16:18-17:1; Exhibit M, Hawkins 6/14/2010 E-mail].

37. DOT hours of service rules for commercial vehicle operators made it impossible or difficult for RSRs who traveled from Alva to routes in Woodward to return

to Alva at the end of the sales day to restock the Schwan's truck. [Exhibit D, Hillaker Depo. 23:1-25:5].

38. Mr. Hawkins also had to drive Schwan's trucks to a mechanic in Enid, Oklahoma. Mr. Hawkins says, "[w]e had the mechanic keep coming to location to work on our Schwan's truck and stuff, but the mechanic and [Hillaker] did not get along, so we got a different mechanic out of Enid to work on the trucks, so [Hillaker] wanted me to drive the truck back and forth to Enid. . ." [Exhibit A, Hawkins Depo. 151:11-21]

39. Mr. Hawkins admits that Mr. Hillaker asked him to drive Schwan's trucks to Enid to get worked on in May and June 2010. [Exhibit A, Hawkins Depo. 152:23-153:4; Exhibit M, Hawkins 6/14/2010 E-mail]

40. It is a violation of DOT regulations for an employee to operate a regulated vehicle without a valid MEC. [Exhibit F, Thompson Affidavit, ¶ 6].

41. Jonathan Talley was a Material Handler at the Alva, depot whom Mr. Hawkins supervised from 2006 until Mr. Hawkins' resignation in 2010. [Exhibit A, Hawkins Depo. 181:8-182:3, Exhibit H, Talley Depo. 10:13-12:23, 18:13-22, Depo. Ex. D, Talley Declaration].

42. Material Handlers fall into two categories: Non-DOT and DOT. The Non-DOT Material Handlers handle inventory and do not drive. [Exhibit N, Non-DOT Material Handler Job Description].

43. Until February 2012, Mr. Talley was a Non-DOT Material Handler. Mr. Talley was unable to obtain DOT-qualification because of his young age, and then

because of his driving record. [Exhibit A, Hawkins Depo. 181:8-182:3, Exhibit H, Talley Depo. 10:5-15].

44. Mr. Talley declares "Mr. Hawkins drove trucks often. He drove them back and forth from Woodward and back and forth to the mechanic's shop – wherever the trucks had to go. ... Mr. Hawkins was still driving trucks everywhere because I could not drive them. I was non-DOT at the time. I was the only Material Handler. Mr. Hawkins had to drive the Schwan's trucks." [Exhibit H, Talley Depo. 18:13-22, Depo. Ex. D, Talley Declaration, Sept. 24, 2012].

E. Procedural and Post-Employment Facts.

45. The U.S. Equal Employment Opportunity Commission ("EEOC") received Mr. Hawkins' Charge of Discrimination on September 1, 2010. It issued a Notice of Right to Sue on January 12, 2012. [Exhibit J, Hawkins' Charge and Right to Sue].

46. Mr. Hawkins told the Oklahoma Security Commission that he was "able and available to seek and accept work." [Exhibit A, Hawkins Depo. 242:2-243:18, Depo Ex. 52, at Plf. Hawkins 812].

III. ARGUMENT AND AUTHORITIES

A. Mr. Hawkins cannot pursue an Oklahoma *Burk* tort.

"[E]ffective November 1, 2011, the Oklahoma legislature amended the OADA to create a statutory cause of action for employment-based discrimination and to abolish common law remedies for such claims. *Peters v. Black Tie Value Parking Service, Inc.*, No. CIV-12-809-D, 2013 WL 149773, at * 3 (Jan. 14, 2013) (citing Okla. Stat. tit. 25, §§ 1101(A), 1350(A)). The remedies abolished include *Burk* claims. *Peters*, No. 2013 WL

149773, at * 3 (citing *Mazzanti v. City of Owasso*, 2012 WL 2505504, at *1 (N.D. Okla. June 28, 2012).

The 2011 amendment applies to claims accruing after November 1, 2011. *Id.* at *4. Mr. Hawkins' claims accrued after November 1, 2011 because he received his Notice of Right to Sue after January 12, 2012. [SUF No. 45]. "A cause of action accrues in Oklahoma when the claim can be maintained, and a claim asserting discrimination accrues when the plaintiff receives a right to sue notice from the Equal Employment Opportunity Commission or Oklahoma Human Rights Commission" *Id.* (citing *Mazzanti*, 2012 WL 2505504, at *1. Mr. Hawkins received his right to sue notice from the EEOC after January 12, 2012, and after the effective date of the amendment. [SUF No. 45]. Mr. Hawkins is prohibited from bringing his action under the OADA as a *Burk* tort.

B. Mr. Hawkins' disability discrimination claims fail.

Mr. Hawkins' brings disability discrimination claims under both the ADA (as amended by the ADA Amendments Act) and the OADA. The ADA prohibits employment discrimination against qualified disabled employees. 42 U.S.C. § 12112(a) *et seq*. Pursuant to the OADA, Okla. Stat. tit. 25, § 1302, Oklahoma also statutorily prohibits employment discrimination against the disabled. "Because the protections provided by the OADA are co-extensive with the protections provided by federal law under the ADA, [Mr. Hawkins'] OADA claim fails if [his] federal discrimination claims fail." *Hamilton v. Oklahoma City University*, No. CIV-10-1254-D, 2012 WL 5949122, at *5 (Nov. 28, 2012) (quoting *McCully v. American Airlines, Inc.*, 695 F.Supp.2d 1255, 1246-47 (N.D. Okla. 2010); *Stanley v. White Swan, Inc.*, 2002 WL 32061753, at *11 (W.D. Okla. Sept. 26, 2002) (unpublished opinion) (internal quotations omitted)).

1. Mr. Hawkins is not a qualified individual with a disability.

To establish a *prima facie* case of disability discrimination under the ADA, Mr. Hawkins must show that (1) "[he] is disabled within the meaning of the ADA; (2) [he] is qualified, with or without reasonable accommodations, to perform the essential functions of the job held or desired; and (3) [he] was discriminated against because of [his] disability. *Robert v. Bd. Of County Com'rs, Brown Cty., Kans.,* 691 F.3d 1211, 1216 (10th Cir. 2012). Mr. Hawkins has the burden of establishing each and every element of a *prima facie* case. *Morgan v. Hilti, Inc.*, 108 F.3d 1319 (10th Cir. 2005).

Mr. Hawkins was neither disabled, nor qualified to perform the essential functions of his job as a Facility Supervisor, nor did Schwan's discriminate against him because of his disability. Consequently, Mr. Hawkins cannot establish any element of his *prima facie* case and his disability discrimination claims fail.

Mr. Hawkins' claims fail because he does not have a disability as the ADA defines that term. The ADA defines disability in three ways: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). It is unclear whether Mr. Hawkins claims an actual disability or a perceived disability. But the undisputed facts demonstrate that Mr. Hawkins' claims fail under either theory.

a. **Mr. Hawkins does not have an actual disability.**

The ADA prohibits discrimination against a "qualified individual with a disability" because of his/her disability in relation to the terms, conditions, and privileges of employment. 42 U.S.C. § 12112(a). Under Tenth Circuit law, "[t]o establish a valid claim under the ADA, a plaintiff must first prove by a preponderance of the evidence that [he] has a disability." *Berry v. T-Mobile USA, Inc.*, 490 F.3d 1211, 1216 (10th Cir. 2007). An individual is disabled if he or she suffers from "a physical or mental impairment that substantially limits one or more of the major life activities' of an individual." *Robertson v. Las Animas County Sheriff's Dept., et al.*, 500 F.3d 1185, 1193-94 (10th Cir. 2007). "Major life activities" under the ADA include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." *Kellogg v. Energy Safety Services, Inc.*, 544 F.3d 1121, 1125 (10th Cir. 2008). An impairment is a disability if it "substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population." 29 C.F.R. § 1630.2(j) (1) (ii).

Mr. Hawkins' heart problem does not substantially limit any major life activity. Mr. Hawkins' Complaint does not disclose which major life activity Mr. Hawkins believes he is substantially limited from doing. Defendant speculates that Mr. Hawkins contends his heart problem substantially limited his ability to work.

If Mr. Hawkins contends he is substantially limited in the major life activity of working, the Tenth Circuit requires that he "demonstrate [he] is unable to perform either a class of jobs or a broad range of jobs in various classes." *MacKenzie v. City and County* *of Denver*, 414 F.3d 1266, 1276(10th Cir. 2005). Mr. Hawkins does not contend that he is unable to work – just that he is unable to obtain a MEC. To the contrary, Mr. Hawkins' premises his disability claim on his argument that he can work, provided he does not have to drive a commercial motor vehicle. He states in his Complaint that he "had no medical restrictions that indicated he could not perform the essential functions of his job [aside from driving a vehicle]." [Pl.'s Complaint, Doc. 1, ¶ 26]. Mr. Hawkins also told the Oklahoma Employment Security Commission ("OESC") that he was "able and available to seek and accept work." [SUF No. 46]. If, as Mr. Hawkins' claims in his Complaint and as he held out to the OESC, he was able and available to work and could perform the essential functions of his job [aside from driving a vehicle], he cannot, as a matter of law "demonstrate [he] is unable to perform either a class of jobs or a broad range of jobs in various classes." *MacKenzie*, 414 F.3d at 1276.

b. Schwan's did not perceive Mr. Hawkins as disabled.

Furthermore, Schwan's did not regard Mr. Hawkins as being substantially limited in his ability to work or as having a disability. Rather, Schwan's regarded Mr. Hawkins, at worst, as being unable to obtain DOT-qualification. The U.S. Supreme Court's ruling in *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) forecloses any argument that Schwan's regarded Mr. Hawkins as disabled based upon his inability to obtain DOT-qualification.

In *Murphy,* the U.S. Supreme Court rejected the plaintiff's claim that the defendant/employer's refusal to employ him as a mechanic – because of the company's belief that he could not obtain DOT-qualification – meant that the employer regarded the plaintiff as disabled. The Supreme Court found that summary judgment was warranted against plaintiff because the evidence showed that plaintiff "at most, [was] regarded as unable to perform only a particular job. This is insufficient, as a matter of law, to prove that [plaintiff] is regarded as substantially limited in the major life activity of working." *Murphy,* 527 U.S. at 525. Similarly, Schwan's at most regarded Mr. Hawkins as unable to obtain DOT-qualification and perform a specific essential function of position as a Facility Supervisor. Schwan's considered Mr. Hawkins fully able to do non-DOT jobs.

Schwan's provided Mr. Hawkins with thirty days to either obtain DOT qualification or find a non-DOT job. [SUF No. 15]. Ms. Brinks told Mr. Hawkins that he could go onto Schwansjobs.com and look for jobs. [SUF No. 18]. She advised Mr. Hawkins that there were non-DOT positions in Oklahoma with other subsidiaries of The Schwan Food Company. [SUF No. 18, 19].

While Schwan's may have regarded Mr. Hawkins as being unable to obtain DOT-qualification, Schwan's did not regard him as possessing any impairment that substantially limited any major life activity. Mr. Hawkins was not disabled under any prong of the ADA definition, and his disability discrimination claims fail.

2. Mr. Hawkins was not qualified to perform his essential job functions.

Determining whether Mr. Hawkins was qualified to perform the essential functions of his job as a Facility Supervisor entails the following two-step inquiry:

> First, the court determines whether the individual can perform the essential functions of the job. . . . Second, *if* (*but only if*) the court concludes that the individual is unable to perform the essential functions of the job, the court

> determines whether any reasonable accommodation by the employer would enable [him] to perform those functions.

Mason v. Avaya Communications, Inc., 357 F.3d 1114, 1118 (10th Cir. 2004).

Possessing a MEC, and therefore having the ability to operate a Schwan's route truck, is an essential function of Mr. Hawkins' Facility Supervisor position. And there are no reasonable accommodations that could have enabled Mr. Hawkins to perform those functions. Mr. Hawkins had to have a MEC to do his job as a Facility Supervisor. Mr. Hawkins is not a qualified individual with a disability and summary judgment is appropriate for Schwan's.

a. DOT-Qualification was an essential function of Mr. Hawkins' Facility Supervisor position.

Obtaining DOT-qualification was an essential function of Mr. Hawkins' position as a Facility Supervisor. "The term 'essential function' is defined as 'the fundamental job duties of the employment position the individual with a disability holds or desires.'" *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) (quoting 29 C.F.R. § 1630.2(n) (1)). "'[C]ourts must give consideration to the employer's judgment as to what functions of a job are essential, including those functions contained in a written job description" though "such evidence is not conclusive." *Davidson*, 337 F.3d at 1191.

"The question of whether a job requirement is a necessary requisite to employment initially focuses on whether an employer actually requires all employees in the particular position to satisfy the alleged job-related requirement." *Davidson*, 337 F.3d at 1191 (quoting *Tate v. Farmland Industries, Inc.*, 268 F.3d 989, 993 (10th Cir. 2001)). "If the employer does require performance of those functions, 'the inquiry will then center around whether removing the function would fundamentally alter the position.'" *Davidson*, 337 F.3d at 1191 (quoting *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1124 (10th Cir. 1995)).

"Evidence considered in determining whether a particular function is essential includes: (1) the employer's judgment as to which functions are essential; (2) written job descriptions prepared before advertising or interviewing applicants for the job; (3) the amount of time spent on the job performing the function; (4) the consequences of not requiring the incumbent to perform the function; and (5) the work experience of past incumbents in the job." *E.E.O.C. v. Health Foods Associates, Inc.*, No. Civ-05-1058-HE, 2006 WL 2863231 at *n. 9 (W.D.Okla., Oct, 4, 2006) (quoting *Mason*, 357 F.3d at 1119).

"The essential function analysis 'is not intended to second guess the employer or to require [it] to lower company standards. . . . Provided that any necessary job specification is job-related, uniformly enforced, and consistent with business necessity, the employer has a right to establish what a job is and what is required to perform it.'" *E.E.O.C. v. Picture People, Inc.*, 684 F.3d 981, 988 (10th Cir. 2012)(quoting *Hennagir v. Utah Dep't of Corr.*, 587 F.3d 1255, 1262 (10th Cir.2009)) "Under [EEOC] regulations, employers may set skill, experience, education and other job related requirements, including physical qualifications for the employment position. *Wilkerson v. Shinseki*, 606 F.3d 1256, 1264 (10th Cir. 2010) (citing *Tate*, 268 F.3d at 993).

Because Facility Supervisors engage in both interstate commerce and in activities directly affecting the safety of motor vehicles on public highways, Mr. Hawkins was subject to DOT regulation. Congress gave the Secretary of Transportation the power to prescribe the qualifications for drivers of commercial motor carriers. 49 U.S.C. § 31102(b) (1). Consequently, the DOT promulgated the "Federal Motor Carrier Safety Regulations," which establish the "minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers" and the "minimum duties of motor carriers with respect to the qualifications of their drivers." 49 C.F.R. § 391.1. Under these regulations, the DOT requires that every individual seeking to drive commercial motor vehicles must pass a DOT physical examination. *See* 49 C.F.R. § 391.41 (describing physical qualifications for drivers).

Schwan's requires all of its Facility Supervisors to obtain DOT-qualifications to operate a Schwan's route truck, which is a commercial motor vehicle over 10,001 pounds. [SUF Nos. 6, 7]. The Facility Supervisor job description states that a Facility Supervisor "[m]ust meet the Federal Department of Transportation eligibility requirements, including appropriate driver's license and corresponding medical certification as a condition of employment for this position." [SUF No. 26]. Schwan's required Mr. Hawkins and his successors to possess a MEC and pass a DOT-regulated medical evaluation. Mr. Hawkins possessed a MEC before Dr. Edwards failed to grant him DOT-qualification. [SUF No. 23]. Schwan's required Seth Bower, the Facility Supervisor that Schwan's hired at Alva after Mr. Hawkins resigned, to obtain a MEC.

[SUF No. 24]. Schwan's required Matthew Valade, the Facility Supervisor Schwan's hired in Alva after Mr. Bower left, to obtain a MEC. [SUF No. 25].

And it would fundamentally alter the Facility Supervisor position to remove the qualification and exempt Mr. Hawkins from having to drive a Schwan's route truck. As a Facility Supervisor, Mr. Hawkins was in charge of maintaining the fleet. [SUF No. 27]. Many Facility Supervisors must also shuttle both loaded and empty trucks to other depots and to RSRs on overnight sales routes. [SUF No. 28]. Before he failed his June 21, 2010 medical examination, Mr. Hawkins performed these tasks. He drove Schwan's route trucks for repair, sometimes to Wichita. [SUF Nos. 29, 33, 38, 39]. He shuttled loaded and unloaded Schwan's trucks back and forth between depots and to RSRs on extended routes. [SUF Nos. 30, 32, 33, 34, 35, 36]. And even if there were periods of time in which Mr. Hawkins did not have to drive a Schwan's route truck, the requirement to be *able to* is still an essential function of the job. After all, "an employer may set standards not only for the mundane work but also for the exceptional." *Wilkerson*, 606 F.3d at 1264.

Also, the consequences of not requiring a Facility Supervisor to hold a MEC and qualify to drive a Schwan's route truck would be a severe disruption to Schwan's business. DOT hours of service rules for commercial vehicle operators make it impossible or difficult for RSRs who travel from Alva to routes in Woodward to return to Alva at the end of the sales day to restock the Schwan's truck. [SUF No. 37]. And Mr. Talley, a Material Handler Mr. Hawkins supervised, was unable to obtain DOT certification while he worked with Mr. Hawkins. [SUF No. 41]. Mr. Talley says that Mr. Hawkins had to drive the route trucks because Mr. Talley was not able to. [SUF No. 44].

A "'limited number of employees available among whom the performance of that job function can be distributed' is relevant to essential-function inquiry." *Robert,* 691 F.3d at 1217 (quoting 29 C.F.R. § 1630.2(n) (2) (ii)). Hours of service rules limited the availability of RSRs for non-sales related driving. And Mr. Talley was disqualified from driving. [SUF No. 42]. If the Facility Supervisor were not able to share in the driving responsibilities, there would be negative consequences to Schwan's business.

Also, Schwan's could not have been expected to relieve Mr. Hawkins of this essential job qualification because to relieve him of responsibilities would have required a reallocation of those responsibilities to other employees. "An employer is not required by the ADA to reallocate job duties in order to change the essential function of a job." *Milton*, 53 F.3d at 1125. The law does not require an accommodation that results in other employees having to worker harder or longer hours. *Milton*, 53 F.3d at 1125.

There is absolutely no dispute that Mr. Hawkins was unable to obtain a MEC. He was not qualified for his position as a Facility Supervisor and could not perform its essential functions.

b. No reasonable accommodation would have allowed Mr. Hawkins to perform the essential functions of his job.

"It is axiomatic . . . that an employer is not required to relieve an employee of an essential job function." *Picture People, Inc.*, 684 F.3d at 987 (citing *Mason,* 357 F.3d at 1122.) Mr. Hawkins alleges that he "asked for the reasonable accommodation of not being required to drive a company vehicle. . ." [Pl.'s Complaint, Doc. 1, ¶ 28]. Schwan's disputes that Mr. Hawkins ever asked for this accommodation. Nonetheless, even if he requested it, it is neither reasonable nor plausible because it requires Schwan's to relieve him of an essential function of his position.

Also, Mr. Hawkins applied for Social Security Disability Insurance ("SSDI") in June 2010. [SUF No. 12]. To apply for SSDI, a person must contend that he or she is too disabled to work. *See Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795, 797-98 (1999). If Mr. Hawkins was unable to perform any job in the national economy, it is unclear how he could have performed his Facility Supervisor job, but for driving a commercial motor vehicle. If Mr. Hawkins cannot explain how his SSDI contention is consistent with his ADA claim that he could "perform the essential functions" of his previous job, then summary judgment for Schwan's is appropriate. *Id.*

C. Schwan's offered Mr. Hawkins options but Mr. Hawkins refused to participate in any interactive process.

Although Schwan's has no duty under the law to accommodate an unqualified, non-disabled individual, Schwan's made efforts to accommodate Mr. Hawkins. Schwan's had provided Mr. Hawkins with leaves of absence whenever he needed leave for medical reasons. On June 22, 2010, Schwan's gave Mr. Hawkins thirty days to either (1) obtain a medical examiner's certificate allowing him to return to his DOT-qualified position, or (2) apply for available non-DOT-qualified positions anywhere within The Schwan Food Company or its subsidiaries. [SUF Nos. 15, 17]. Ms. Brinks specifically told Mr. Hawkins that he could apply for other non-DOT positions on Schwansjobs.com. [SUF No. 18]. She provided examples of non-DOT positions with other subsidiaries of The Schwan Food Company. [SUF No. 18].

Mr. Hawkins says that he accessed Schwansjobs.com and looked at jobs but did not apply for any. [SUF No. 20]. Instead of making any serious effort to determine whether either of these options would have allowed Mr. Hawkins to remain employed by Schwan's, Mr. Hawkins resigned the next day. [SUF No. 21].

An interactive process requires participation by both parties. *E.E.O.C. v. C.R. England, Inc.*, 644 F.3d 1028, 1049 (10th Cir 2011) ("To facilitate the reasonable accommodation, the federal regulations implementing the ADA envision an interactive process that requires participation by both parties.")(internal quotations and citations omitted). Schwan's initiated and participated in the interactive process the ADA contemplates (even though Mr. Hawkins was not disabled and it did not have to) and Schwan's cannot be faulted for Mr. Hawkins' failure to participate.

See also Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999) ("Participation [in the interactive process] is the obligation of both parties . . . so an employer cannot be faulted if after conferring with the employee to find possible accommodations, the employee then fails to [do what he is supposed to]"); *Barnett v. U.S. Air, Inc.,* 228 F.3d 1105, 1114 (9th Cir. 2000) (en banc), *jgmt. vac'd on other grounds,* 535 U.S. 391 (2002) ("The interactive process is mandatory, and both parties have a duty to participate in good faith."); *Bultemeyer v. Fort Wayne Cnty. Schs.,* 100 F.3d 1281, 1285 (7th Cir. 1996) (when a party fails to participate in good faith in the interactive process, "courts should attempt to isolate the cause of the breakdown and then assign responsibility.").

Also, an employee must show that a reasonable accommodation *existed* in order to preclude summary judgment for the employer. "[E]ven if the employer failed to sufficiently engage in the interactive process, the employer can still prevail on summary judgment if the employee failed to 'show that a reasonable accommodation was possible.'" *Frazier v. Simmons*, 254 F.3d 1247, 1261 (10th Cir. 2001)(quoting *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1174 (10th Cir. 1999)). In this case, there is no possible reasonable accommodation because it is not reasonable to require Schwan's to eliminate an essential function of Mr. Hawkins' Facility Supervisor position.

D. Schwan's did not retaliate against Mr. Hawkins.

In order to establish a *prima facie* case of retaliation, Mr. Hawkins must produce evidence to prove "(1) that [he was] engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action." *Picture People, Inc.*, 684 F.3d at 988. If Mr. Hawkins establishes these factors (which he cannot), Schwan's must show it had a legitimate, nondiscriminatory reason for the adverse action. *Id.* Once Schwan's meets that burden, the burden shifts back to Mr. Hawkins to prove pretext, which requires a showing that the proffered non-discriminatory reason is "unworthy of belief." *Id.* (quoting *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir.2010)).

1. Schwan's did not take any adverse employment action against Mr. Hawkins.

Mr. Hawkins alleges in his Complaint that on June 14, 2010, he "complained to Jeff Booth (HR Manager) of the retaliatory treatment." [Pl.'s Complaint, Doc. 1, ¶ 22].

This is the protected activity Mr. Hawkins alleges. Mr. Hawkins stated in this middle of this long e-mail to Mr. Booth that Mr. Hillaker was "trying to force me to quit because of my health." [Exhibit M, Hawkins 6/14/2010 E-mail].

But this e-mail actually supports Schwan's legitimate decisions. Mr. Hawkins wrote to Mr. Booth that Mr. Hillaker had him drive the Schwan's route trucks to Enid and to Woodward. [SUF No. 13]. Mr. Hawkins admitted legitimate and necessary reasons for these decisions. The local mechanic was not doing a good job. And the RSRs in Woodward were not coming back to the Alva depot. [SUF No. 13]. Mr. Hawkins said his concern was that Mr. Hillaker required him to drive, even though Mr. Hawkins was having fainting spells. [SUF No. 13]. Mr. Hawkins admitted he was unsafe to drive.

There is no adverse employment action. To establish that an employment action is materially adverse, Mr. Hawkins must show that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1087 (10th Cir. 2007) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)) (internal quotation marks omitted)).

What happened after Mr. Hawkins' June 14 e-mail to Mr. Booth was that Mr. Hawkins visited Dr. Edwards, failed a DOT medical examination, and Schwan's placed him on leave because he lost an essential job qualification. [Pl.'s Complaint, Doc. 1, ¶¶ 22-29]. Mr. Hawkins admits that Dr. Edwards' failure to pass him was justified – that Mr. Hawkins' condition disqualified him from obtaining a MEC. [SUF No. 8]. Therefore, the resulting suspension was not materially adverse, because it was warranted. The only thing Mr. Hawkins disputes is that possessing a MEC is an essential qualification of his Facility Supervisor position.

2. Mr. Hawkins cannot establish that Schwan's legitimate, non-retaliatory reason for placing Mr. Hawkins on leave was a pretext for retaliation.

Schwan's did not place Mr. Hawkins on leave because he talked to Mr. Booth. Schwan's placed him on leave because he admittedly could no longer be DOT-qualified. Because the Facility Supervisor position requires DOT-qualification, Mr. Hawkins could no longer be a Facility Supervisor. Mr. Hawkins cannot produce any evidence to demonstrate Schwan's reason for placing him on leave and providing him time to obtain DOT-qualification or find a non-DOT job is a pretext for retaliation.

The Tenth Circuit has stated, "a plaintiff can demonstrate pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's reasons for its action, which a reasonable fact finder could rationally find unworthy of credence." *Chavez v. Thomas & Betts Corp.*, 396 F.3d 1088, 1104 (10th Cir.2005), overruled on other grounds as recognized in *Law Co., Inc. v. Mohawk Const. and Supply Co.*, 577 F.3d 1164, 1170 (10th Cir.2009). None of those factors applies here. By stipulating that he could not obtain DOT-qualifications, Mr. Hawkins is also admitting that Schwan's acted on a legitimate belief that maintaining DOT-qualifications is an essential qualification of the Facility Supervisor position. Mr. Hawkins can produce no evidence to suggest otherwise.

IV. CONCLUSION

Mr. Hawkins admits he had to drive a Schwan's route truck. He admits his medical conditions kept him from obtaining a MEC. He admits that Schwan's reasons for placing him on leave were legitimate (so long as possessing a MEC was an essential job function). The only thing Mr. Hawkins denies is that the ability to drive a Schwan's route truck was an essential qualification of his Facility Supervisor job. But the qualification is in his job description, his successors had to meet that qualification, he *actually* drove the Schwan's route trucks, and a Facility Supervisor cannot reasonably be expected to manage a fleet of commercial vehicles without maintaining the ability to drive one. Obtaining a MEC and being DOT-qualified is an essential qualification of Mr. Hawkins' Facility Supervisor position.

WHEREFORE, for the reasons set forth herein, Schwan's respectfully moves for summary judgment on all of Mr. Hawkins' claims.

Dated this 2nd day of April, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of April, 2013, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

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